SANCTUARY COURT SDN BHD A

v.

AEH CAPITAL SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR B
SM KOMATHY SUPPIAH JC
[CIVIL SUIT NO: S2-22-700-2010]
18 SEPTEMBER 2013

CONTRACT: *Breach - Agreement - Claim for refund of monies paid - Default by plaintiff to settle outstanding sum due - Terms in agreement - Defendant's option vide cl. 9 to either terminate agreement or apply for specific performance - Failure to exercise option - Whether defendant's non-exercise of its remedy constitutes a default or breach of cl. 9 - Whether claim barred by limitation, laches and/or acquiescence - Whether there was undue delay in instituting action* C D

LIMITATION: *Contract - Accrual of cause of action - Refund of monies paid - Defendant's failure to exercise option in agreement - Whether plaintiff's cause of action crystallised upon termination of agreement - Whether claim barred by limitation, laches and/or acquiescence* E

The plaintiff's claim was premised on the Sale and Purchase Agreement of Debts ('the agreement') which the parties had entered into. Based on the facts, the plaintiff agreed to purchase certain assets from the defendant and the payment was to be F made on an instalment basis. The plaintiff, however, defaulted in payment for the third and subsequent instalments. By a letter dated 13 November 2001, the defendant informed the plaintiff that it had defaulted to make payment on the instalments due and requested for the full outstanding amount to be forwarded or at G the very least, that a proposal to be forwarded by the plaintiff on the payment plan to settle the outstanding amount. For nine years, there was no communication between the parties. However, in 2010, the plaintiff instituted this action against the defendant to recover the sum of RM6,252,659.84 which it alleged was H refundable to it. The terms *vide* cl. 9 of the agreement required the defendant to either terminate the agreement or treat it as subsisting by applying for specific performance. It was alleged that pursuant to cl. 9(a), 10% of the consideration sum would be forfeited as agreed liquidated damages and the balance sum to be I returned to the plaintiff since the agreement had been terminated

by the conduct of the plaintiff. The issues that arose for consideration were (i) whether the defendant was obliged to exercise its remedy under cl. 9 of the agreement in the event of a default by the plaintiff; (ii) whether the defendant's non-exercise of its remedy under cl. 9 of the agreement constitutes a default or breach of cl. 9; (iii) whether the plaintiff's claim was barred by limitation, laches and/or acquiescence; and (iv) whether the plaintiff was entitled to a refund of the sum of RM6,252,659.84 pursuant to cl. 9(a) of the agreement.

Held (allowing plaintiff's claim with costs; ordering defendant to refund the sum of RM6,252,659.84 with interest):

(1) Clause 9 must be accorded the meaning it clearly conveys. There was nothing in the language of cl. 9 which suggested that the exercise of the options therein were discretionary or optional in nature. The defendant was thus in breach of its obligation as contained in cl. 9 when it failed to exercise the options mandated therein. (paras 10 & 13)

(2) The party in breach of a contract has no right to terminate an agreement by relying on its breach. On the facts, *vide* cl. 9, the parties had expressly provided in their agreement that it was only the defendant who had the option to terminate the agreement or treat it as subsisting upon the plaintiff's default to make payments. The contractual right to terminate the agreement was conferred only on the defendant (*Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd*; foll) (*Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd*; foll). (paras 22 & 26)

(3) As a contract breaker, the plaintiff had no choice but to wait for the defendant to make an election upon its default on whether to accept the repudiation and terminate the agreement or to treat it as subsisting. The defendant, as the innocent party, had up to six years to make an election. Its cause of action against the plaintiff accrued when it issued the letter dated 13 November 2001 to request for the payment of the outstanding balance or a payment proposal plan, and expired on 13 November 2007. It follows that the plaintiff's cause of action for a refund of the monies would have crystallised upon the termination of the agreement on 13 November 2007 when the defendant was no longer entitled to apply for specific performance of the agreement.

Thus, the plaintiff's cause of action would have become statute barred six years thereafter. As the suit was filed in 2010, it was not barred by limitation. (paras 27 & 28)

(4) Laches and acquiescence are equitable doctrines that rest on the same basis as the law of limitation. However, while statute ordinarily prescribes a fixed time limit which applies in general, irrespective of the conduct of the parties, the equitable doctrine looks primarily at the conduct of the plaintiff and its effect on the defendant or third parties so that the length of time varies greatly in accordance with the circumstances and the type of relief sought. On the facts, there was no undue delay in the institution of this action. Further, the defendant had failed to adduce any evidence to show that the plaintiff had made any representation that it would not launch this suit or abandoned its claim for the refund of the monies if the defendant failed to exercise its options in cl. 9. Hence, the claim was not barred by laches and acquiescence. (paras 30, 35 & 36)

Case(s) referred to:
Ambank (M) Bhd v. Abdul Aziz Hassan & Ors [2010] 7 CLJ 663 CA ***(refd)***
Chin Kim & Anor v. Loh Boon Siew [1969] 1 LNS 27 FC ***(refd)***
Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd [2005] 2 CLJ 914 FC ***(foll)***
Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd [1998] 3 CLJ 619 CA ***(foll)***
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***
Ong Ah Bee v. Hii Chung Siong, Robin [1993] 1 CLJ 504 HC ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 6

Other source(s) referred to:
Chitty On Contracts, 27th edn, para 28
Snell's Equity, 31st edn, 2005, para 5
Spry, *The Principles of Equitable Remedies*, 8th edn, 2010, pp 239

For the plaintiff - Kenneth Gomez; M/s Sabarudin Othman & Ho
For the defendant - Wong Chong Wah (Shaleni with him); M/s Skrine

Reported by Kumitha Abd Majid

JUDGMENT

SM Komathy Suppiah JC:

Introduction

[1] In this action, the plaintiff company is suing for the refund of RM6,252,659.84 that it alleges the defendant is contractually liable to refund pursuant to cl. 9 of the sale and purchase agreement the parties had entered into. The plaintiff's claim is premised on the allegation that the said agreement has been terminated by the conduct of the defendant. The defendant has denied liability to refund the monies claiming, *inter alia*, that the claim is barred by limitation.

The Facts

[2] The facts that emerged in evidence at the trial were as follows;

(a) On 22 May 2000, the plaintiff and defendant entered into a sale and purchase agreement of debts. By that agreement the plaintiff agreed to purchase from the defendant certain assets (a piece of land in Sabah and 36 office units in Pacific Mall Johor Bahru) acquired by the defendant under a section 176 scheme from a company known as YCS Sdn Bhd ("YCSB"). The defendant had obtained these assets under the section 176 scheme on account of a secured loan it granted to Bismaraya Sdn Bhd ("BSB"), which payment was guaranteed by YCSB.

(b) Clause 1 of the agreement set out what was purchased by the plaintiff. It read:

> Clause 1
>
> 1. Sale and Purchase
>
> In consideration of the payment of Consideration (as defined in Clause 2 herein) and subject to the terms and condition hereinafter appearing the Transferor hereby agrees to sell to the Transferors all its rights interest and benefits under the Scheme of Arrangement and Compromise Repayment and the Supplemental Agreement ("the assets") including:
>
> (a) the Security Documents and any other rights attaching thereto save for the RCSLS-C issued;

(b) 5,000.00 YCSB shares converted from RM5,000.00 RCSLS-C issued ("the Converted Shares"). A

(c) The agreement was structured in a manner that it would enable the defendant to exit from the section 176 scheme, and allow the plaintiff to purchase the loan stocks issued, and recover the securities held by the defendant. It would also have enabled the defendant to receive the consideration sum within seven months and exit the section 176 scheme, and not wait for five years or hold on to the securities under the BSB loan deal and the section 176 scheme. B C

(d) The plaintiff agreed to pay the consideration of RM15,287,939 in the following manner:

(i) The first instalment of RM1,476,851 on the execution of the agreement; D

(ii) Five monthly instalments of RM2,400,000 each the first to be paid on or before 1 July 2000 and the remaining instalments shall be payable at the beginning of each consecutive month; and E

(iii) A final instalment on or before 31 December 2000 of only RM1,811,088.

(e) By cl. 15, time was declared to be the essence of the agreement. F

(f) The plaintiff, however, defaulted on making payment on the third and subsequent instalments. The plaintiff, upon default of payment of the instalments, then wrote to the defendant on 30 June 2000 and 8 July 2000 to request for extensions of time to settle the outstanding instalments due. G

(g) Following this, the defendant agreed to allow the plaintiff to make partial payments on the sum owed under the third instalment. The plaintiff did make partial payment amounting to RM1,500,000 up to March 2001, with the last payment of RM500,000 received from the plaintiff on 24 March 2001. H

(h) The plaintiff then defaulted on the remaining balance payments due on the third instalment and remaining outstanding instalments due. I

(i) By letter of 13 November 2001, the defendant informed the plaintiff that it had defaulted to make payment on the instalments due and requested that the full outstanding amount be forwarded or at the very least, that a proposal be put forwarded by the plaintiff on the payment plan to settle the outstanding amount. This letter went unanswered by the plaintiff.

(j) For nine years thereafter, there was no communication between the parties.

(k) In 2010, the plaintiff instituted this action against the defendant to recover the monies refundable to it pursuant to cl. 9(a). It was alleged that pursuant to cl. 9, the plaintiff was only entitled to forfeit 10% of the consideration sum as agreed liquidated damages and return the balance.

Clause 9

[3] Clause 9 of the agreement is central to the plaintiff's claim, it is necessary to set out the clause in full (in the agreement "the transferee" refers to the plaintiff and "transferor" refers to the defendant):

> Default by Transferee
>
> In the event that the transferee shall default in the payment of any of the instalments as stipulated in clause 2 above the transferor shall be at liberty by notice in writing either:
>
> (a) To terminate this agreement at any time after such breach and forfeit 10% of the consideration only as agreed liquidated damages and any monies paid by the Transferee to the Transferors over and above the liquidated damages shall be refunded to the Transferee free of interest within fourteen (14) days from the date of termination in exchange for the return of the Documents held by the Stakeholder and thereafter this Agreement shall be terminated and shall be of no further force or effect and neither party shall have any claim against the other in respect thereof save and except for any antecedent breach; or
>
> (b) To take such action as may be necessary to complete specific performance of this Agreement for such breach.

Plaintiff's Case

[4] The plaintiff's case is that cl. 9(a) has been triggered by the termination of the agreement by the conduct of the plaintiff.

Defendant's Case

[5] The gravamen of the defence is pleaded in paras. 19, 20 and 21 of the re-amended statement of defence.

> 19. In reply to paragraphs 17 to 21 of the Amended Statement of Claim, the Defendant states as follows:
>
> (i) the defendant did not and was not obliged to repudiate or to issue a repudiation notice on account of the plaintiff's breach of the sale & purchase agreement;
>
> (ii) the plaintiff cause of action against the defendant, i.e for not repudiating or failing to repudiate the sale & purchase agreement as pleaded, if any, which is denied, would in any event arise, immediately upon the plaintiff's breach of the sale & purchase agreement; and
>
> (iii) in the present case, the plaintiff has, as of Mac 2001, failed, refused and or neglected to make payment of the outstanding instalments due, and in any event failed or refused to honour the payments tendered through its 7 post dated cheques dated 29 January 2001, 28 February 2001, 29 March 2001, 29 April 2001, 29 May 2001, 29 June 2001 and 29 July 2001.
>
> 20. For the foregoing reasons, the defendant states that the plaintiff's inaction for 9 years in seeking the alleged refund or repayment of monies paid, if any, which is denied, clearly shows that the plaintiff has treated the sale and purchase agreement to be mutually terminated and that the plaintiff has waived all its rights therein.
>
> 21. Further, the plaintiff is now stopped by conduct from bringing this suit against the defendant.

Witnesses

[6] The parties called one witness each. The plaintiff called Yoong Voon Chow, its financial consultant. In his testimony under cross-examination, Yoong explained that the plaintiff was unable to pay the full consideration sum mentioned in the agreement as it did not have sufficient funds.

[7] Mr Chan Guan Seng, a director in the defendant company was the only witness for the defendant. The defendant's explanation for not exercising the options in cl. 9 is:

> The defendant cannot elect to exercise clause 9 of the agreement because the RCSL-C have been converted into ordinary shares on the plaintiff's instructions and they were held in a nominee account for the plaintiff. The defendant can only dispose of it upon the instruction from the plaintiff.

Issues

[8] The issues for the determination of the court were:

(a) Whether the defendant is obliged to exercise its remedy under cl. 9 of the agreement in the event of a default by the plaintiff?

(b) Whether the defendant's non-exercise of its remedy under cl. 9 of the agreement (if any which is denied) constitutes a default or breach of cl. 9, particularly bearing in mind the existence and effect of cl. 15 of the agreement.

(c) In the event the court finds that there is default (which is denied) when does the cause of action for this alleged default arise?

(d) Whether the plaintiffs claim is barred by limitation, laches and/or acquiescence?

(e) Is the plaintiff entitled to a refund of RM6,252,659.84 pursuant to cl. 9(a) of the agreement.

First Issue: Whether Clause 9 Was Discretionary?

[9] The first issue calls for an interpretation of cl. 9. The plaintiff contended that the terms of cl. 9 defendant were clear and imposed a contractual obligation upon the defendant to exercise one of the two options provided in the said clause upon the default of the plaintiff to make payments. The defendant, on the other hand, contended that the cl. 9 did not impose an obligation that was mandatory in nature, but was optional. The defendant was entitled to choose not to terminate or affirm the agreement upon a breach being committed by the plaintiff.

[10] I do not detect anything in the language in cl. 9 which suggests that the exercise of the options therein is discretionary or optional in nature as suggested by the defendant. Clause 9 must be accorded the meaning it clearly conveys. I therefore fail to see how it can be argued that cl. 9 does not impose a contractual obligation which is mandatory in nature.

Second Issue: Whether The Defendant Was In Breach Of Clause 9?

[11] I now turn to consider whether the defendant was in breach of cl. 9 on account of its failure to exercise the options set out there. It was common ground that no notice in writing under cl. 9 has been served by the defendant on the plaintiff and that the defendant has remained silent and has not made known its option to the plaintiff for the last nine years.

[12] The plaintiff argued that by refusing or failing to exercise its obligations, the defendant was in breach of cl. 9. The defendant did not deal with this point in their submission, but contended that cl. 9 was inapplicable in light of the placement of the RCLS-C and its conversion into ordinary shares in the plaintiff's name. It was argued that consequently there was no longer any issue of the defendant being able to terminate the agreement and be restored to its original position as envisaged in cl. 9. It is crucial to note that this allegation was not pleaded in the defence. In my view, it would be wrong to permit the defendant to raise issues which are not pleaded nor disclosed during case management. The defendant is therefore precluded from raising this new issue.

[13] On the second issue, I find that the defendant was in breach of its obligation as contained in cl. 9 when it failed to exercise the options mandated by cl. 9. The terms of cl. 9 required the defendant to either terminate the agreement or treat it as subsisting by applying for specific performance.

Third And Fourth Issues: Whether Claim Barred By Limitation?

[14] I now turn to the third issue which deals with the date the defendant's breach took place. The determination of this issue would indicate if the plaintiff's claim is barred by limitation.

[15] Section 6 of the Limitation Act 1953 provides;

> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
>
> (a) Actions founded on a contract or on tort;
>
> ...

[16] In *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 615 the Federal Court established the principle that the cause of action under a contract accrues on the date of breach and the time runs from the breach. This principle was reaffirmed recently in *Ambank (M) Bhd v. Abdul Aziz Hassan & Ors* [2010] 7 CLJ 663; [2010] 3 MLJ 784.

[17] On the question of the burden of proof of when a cause of action is claimed to be statute-barred, I accept that on the authorities, the plaintiff must first show that on the balance of probability his cause of action arose within the limitation period, and that, if he does so, the burden shifts to the defendant to show that in truth the cause of action arose at an earlier date see *Ong Ah Bee v. Hii Chung Siong, Robin* [1993] 1 CLJ 504.

[18] I now turn to examine the statement of claim to determine the date the defendant's breach. In its pleading, the plaintiff in paras. 22(iv) and (vi) averred as follows:

> (iv) Satu deklarasi bahawa oleh kerana defendan telah gagal untuk melaksanakan pilihan mereka menurut klausa 9 dalam perjanjian tersebut, dan oleh yang demikian perjanjian tersebut telah dibatalkan kerana penghabisan masa, oleh itu pihak-pihak terpaksa mengikut remedy mereka dalam klausa 9 daripadanya;
>
> (vi) Satu deklarasi bahawa defendan dengan kelakuannya dan penghabisan masa telah membatalkan perjanjian jual beli tersebut bertarikh 22hb Mei 2000;

[19] Notwithstanding the pleadings, the plaintiff took a contrary position that the agreement was still subsisting and submitted thus:

> Therefore, clause 9(a) itself, which itself gives the date of termination, it is therefore our submission that the termination date can only come after the exchange and return of the documents

that are being held by the stakeholder's solicitors. So the date of termination will only take place after the relinquishment by M/s. Wong Lu Peen of their stake-holding duties. However when DSW1 was asked in cross-examination when did he take back the assets and documents from the stakeholder solicitor, M/s. Wong Lu Peen, he could not answer and was evasive (please see the Q & A on page 46 of the Notes of Evidence as shown below). He stated that he had no idea. He refused under cross-examination to reveal that he had back the security documents from the stakeholder solicitors. If he had taken back the security documents, this act by itself would have brought the agreement to an end, for M/s. Wong Lu Peen's stake-holding duties would only run during the duration of the agreement.

[20] As observed earlier, parties are bound by their pleadings and a party is precluded from formulating a case which is inconsistent with its pleadings. In accordance with this principle, the plaintiff is not entitled to take inconsistent positions as to when the defendant's breach took place. The plaintiff is bound by its pleaded case that the breach took place when the defendant failed to exercise the options within the limitation period of six years as prescribed by s. 6 of the Limitation Act 1953.

[21] On the other hand, the defendant contended that the plaintiff's cause of action accrued on 25 March 2001 because the last payment from the plaintiff was received by the defendant on the 24 March 2001. The defendant did not receive any further payments from the plaintiff. Hence the six year limitation period started to run from that date and expired on 25 March 2007. The defendant's case is that as proceedings were not issued until 26 July 2010, the plaintiff's claim was barred by limitation.

[22] The rights of an innocent party to a contract upon a breach being committed by the other party to the contract is well settled. The innocent party has the right or option to terminate the agreement or treat it as subsisting. The party in breach of a contract has no right to terminate an agreement by relying on its breach. This is illustrated by the decisions of the Court of Appeal in *Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd* [1998] 3 CLJ 619; [1998] 3 MLJ 860 and *Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd* [2005] 2 CLJ 914; [2009] 3 MLJ 349.

[23] In *Leong*'s case, NH Chan JCA observed at pp. 624-625 of [1998] 3 CLJ 619; p. 863 of [1998] 3 MLJ 860:

> Even if the first defendant had repudiated (that is to say, 'refused to perform') the agreement 'in its entirety' by refusing to pay at all any further rental instalments, (as a matter of contract law) that would not have terminated the agreement. In this case, it is only the plaintiff who has the right to terminate the agreement. Put in another way, the plaintiff could elect to treat the contract as at an end by accepting the repudiation and terminating the contract. See s. 40 of the Contracts Act 1950 which and terminating the contract. See s. 40 of the Contracts Act 1950 which reads:
>
> > When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance. (emphasis added)
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> ILLUSTRATIONS
>
> (a) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her $100 for each night's performance. On the sixth night A wilfully absents herself from the theatre. B is at liberty to put an end to the contract.
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> (b) A, a singer enters into a contract with B, the manager of a theatre to sing at this theatre two nights in every week during the next two months, and B engages to pay her the rate of $100 for each night. On the sixth night A wilfully absents herself. With the assent of B, A signs on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.
>
> In the present case, the first defendant had disabled itself from performing its agreement in its entirety by losing the bus to the authorities. Even this fact would not mean that the first defendant had terminated the hire purchase agreement. Section 40 of the Contracts Act gives to the plaintiff (that is, the promise) the right to elect to terminate the agreement and recover damages under s. 76 of the Act or to treat the agreement as alive and continuing.

[24] In *Johor Coastal*, Gopal Sri Ram JCA said (at p. 923 (CLJ); p. 358 (MLJ): A

> As to the choices open to an innocent party when a contract is broken, this was dealt with by this court in *Lim Ah Moi v. AMS Periasamy Suppiah Pillay* [1997] 3 MLJ 323 as follows: B
>
> > When the vendor's solicitors stated in their letter of 31 July 1986 their client's inability to convey 5.5 acres of the land to the appellant, there was a clear breach of the terms of the sale and purchase agreement. Once he received that intimation, the appellant had at least two alternatives open C to him. These alternatives appear in s. 40 of the Contracts Act 1950 which is in the following terms:
> >
> > ...
> >
> > The other way of stating the rule is this. An innocent party D against whom a contract is repudiated may either accept the repudiation and sue for damages or he may treat the contract as continuing and sue for specific performance.

[25] The Federal Court in *Chin Kim & Anor v. Loh Boon Siew* [1969] 1 LNS 27; [1970] 1 MLJ 197 had occasion to consider E the effect of a delay by the innocent party to exercise his options upon a breach committed by the contract-breaker. In that case the purchaser applied for specific performance of a sale and purchase agreement after four years of the vendor's breach. In setting aside the decision of the High Court in allowing specific F performance of the agreement, Ong CJ said;

> The position of the purchaser in the instant case is thus stated in Fry on Specific Performance (6th Ed.) p. 515 as follows:
>
> > Where the contract is in anywise unilateral, as, for instance, G in the case of an option to purchase, a right of renewal, or of any other condition in favour of one party and not of the other, then any delay of the party in whose favour the contract is binding is looked at with especial strictness. On this principle, the delay of a purchaser in deciding whether H he will or will not accept the title is an injustice, because the purchaser can enforce the contract against the vendor whether the title be good or bad, whereas the vendor can only do so in case of a good title.

I

> In this case one should have thought that the purchaser would not hesitate to make his position clear one way or the other. Yet he did nothing of the sort. If he disagreed that the vendors were on-titled to repudiate, he had only to say so. Had he been at all desirous of completing the purchase - even without vacant possession - all he had to do was perfectly simple, namely, give notice to the vendors of his intention so to do and tender the whole purchase price. What else were the vendors reasonably to assume by reason of his complete silence except that he acquiesced in their tearing up the agreement? What was the proper inference the court should have drawn from his conduct? Should not he, as a reasonable man, have taken action within a reasonable time after a breach of contract by the other party, unless he in fact acquiesced in its rescission? In my opinion a lapse of over four years - between June 8, 1962 and August 29, 1966 - is not even within measurable distance of the reasonable time he needed to make up his mind. His conduct therefore compels me to conclude that he accepted the rescission. Having so agreed I cannot see how he is entitled even to damages, much less specific performance.

[26] In the instant case, by cl. 9, the parties here have themselves expressly provided in their agreement that it is only the defendant who has the option to terminate the agreement or treat it as subsisting upon the plaintiff's default to make payments. The contractual right to terminate the agreement is conferred only on the defendant.

[27] Applying the principles laid down in the two Court of Appeal decisions to the facts here, I find that the party in breach of the agreement is the plaintiff. As the contract breaker, the plaintiff had no choice but to wait for the defendant to make an election upon its default on whether to accept the repudiation and terminate the agreement or to treat it as subsisting.

[28] The defendant as the innocent party, in my view, had up to six years to make an election. Its cause of action against the plaintiff accrued when it issued the letter of 13 November 2001 to ask for payment of the outstanding balance of RM6,336,177.93 due or a payment proposal plan, and expired on 13 November 2007. It follows that the plaintiff's cause of action for a refund of the monies would have crystallised upon the termination of the

agreement on 13 November 2007 when the defendant was no longer entitled to apply for specific performance of the agreement. The plaintiff's cause of action against the defendant would have become statute barred six years thereafter on 13 November 2013. As this suit was filed in 2010, it is not barred by limitation.

[29] The defendant's submission that the plaintiff's claim is barred by limitation cannot be sustained.

Fifth Issue: Whether Claim Barred By Laches And Acquiescence

[30] Lastly, I turn to the defences of laches and acquiescence. It is well known that laches and acquiescence are equitable doctrines that rest on the same basis as the law of limitation, that stale demands should not be enforced; but with this difference, that while statute ordinarily prescribes a fixed time limit which applies in general irrespective of the conduct of the parties, the equitable doctrines look primarily at the conduct of the plaintiff and its effect on the defendant or third parties so that the length of time varies greatly in accordance with the circumstances and the type of relief sought (See *Chitty On Contracts* 27th edn. (para 28-101)).

[31] The defendant contended that it would be inequitable to allow the plaintiff to enforce cl. 9 of the agreement because of its inaction for the last nine years.

[32] In *Snell's Equity* (31st edn. 2005) the defence of laches is summarised thus (at paras. 5-19):

> Laches essentially consists of a substantial lapse of time coupled with the existence of circumstances which make it inequitable to enforce the claim. Delay will accordingly be faithful to a claim for equitable relief if ... [omitting words of no immediate relevance to the present facts] ... the Claimant has so acted as to induce the Defendant to alter his position on the reasonable faith that the claim has been released or abandoned. But apart from such circumstances delay will be immaterial. There can be no abandonment of a right without full knowledge, legal capacity and free will, so that ignorance or disability or undue influence will be a satisfactory explanation of delay ... Despite the enlarged scope of the Limitation Act 1980, there are many equitable claims to which these principles apply ... [including] ... claims for equitable remedies such as specific performance ... (omitting footnotes).

[33] The same underlying principle is on occasions referred to as "acquiescence". In Spry, *The Principles of Equitable Remedies* (8th edn. 2010), it is stated (at pp. 239-40):

> Acquiescence is found when, in the first place, there is an express or implied representation by the Plaintiff that he intends not to compel performance in specie by the Defendant of the obligation in question. Then, secondly, if in consequence of that representation it becomes unjust that specific performance should be granted, either because the position of the Defendant has been prejudiced through reliance on it or on any other basis, the Plaintiff is confined to such other remedies as may be appropriate.

[34] Under whichever legal label one proceeds, the crucial questions are; first, delay by the plaintiff and, second, an alteration of position by the defendant in the reasonable belief, induced by the plaintiff, that the claim has been released or abandoned.

[35] So far as the first element of delay is concerned, for the reasons I have expressed in para. 29, I am satisfied that there is no undue delay in the institution of this action. As for the second element, the defendant has failed to adduce any evidence to show that the plaintiff has made any representation that it would not launch this suit or abandoned its claim for the refund of the monies if the defendant failed to exercise its options in cl. 9.

[36] On the facts of this case I find that the claim is not barred by laches and acquiescence.

Conclusion

[37] I therefore allow the plaintiff's claim and order that the defendant refund the sum of RM6,252,659.84 with interest at 5% per annum from the date of filing of this action until realisation. I further order that the defendant pay the plaintiff costs of RM10,000.